MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1162

UNITED STATES OF AMERICA,

Petitioner,

v.

THOMAS JOSEPH WILSON and
BOBBY ANTONIO BRYAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BOBBY ANTONIO BRYAN

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QUESTION PRESENTED

Whether Rule 42 of the Federal Rules of Criminal Procedure, or the Due Process Clause of the Fifth Amendment requires that a witness who, in an orderly manner, refuses to testify at a trial be given a hearing before he is sentenced to serve six months in prison?

STATEMENT

On March 30, 1970, Respondent Bobby Antonio Bryan was called to testify at the trial of one Robert Anderson on Indictment 73 Cr. 147. Since Bryan's attorney, Mr. Brown, was not available on that day, the Court assigned Mrs. Hermann, a member of the Legal Aid staff, to represent Bryan (A. 24-25).

Prior to Bryan actually being called to the stand, the Government and the Court indicated that if Bryan asserted his Fifth Amendment privilege, he would be granted immunity. Mrs. Hermann, speaking on Bryan's behalf, noted that Bryan had recently been sentenced on his plea of guilty on a related indictment, 72 Cr. 1190, to the maximum sentence possible pursuant to the provision of 18 U.S.C. Section 4208(b), and that he was to be resentenced in the future, after the study provided for by that statute had been completed. Mrs. Hermann argued that any grant of immunity to Bryan would not be co-extensive with his Fifth Amendment privilege because the judge who would resentence Bryan might base that sentence on facts elicited during Bryan's testimony (A. 23-28).

Bryan was then called to the stand and the following occurred:

> "Q. Mr. Bryan, On October 10, 1972, did you along with the defendant Robert Anderson, commit a bank robbery in the Nanuet National Bank, Mount Ivy, New York?
>
> A. I Refuse to answer the question on the ground they might tend to incriminate me.
>
> Mr. Feinberg: I would ask the Court to instruct the witness that he has to answer the question posed.

The Court: Mr. Bryan, I do instruct you that you must answer those questions. As I understand it you have pleaded guilty to that very bank robbery and therefore I fail to understand how you are admitting that you did commit the bank robbery at this time can incriminate you?

The Witness: Your Honor–

The Court: Say what you wish.

The Witness: I have pleaded to an assault with a weapon. I have not pleaded to a bank robbery.

The Court: Is that so?

The Defendant: That is so.

The Court: If that is so I would agree with you.

Mrs. Herman: I have no personal knowledge of that.

Mr. Kahn (attorney for the defendant Anderson): That is so. I refer your Honor to the affidavit of Mr. Brown.

The Court: You are correct, Mr. Bryan, and I sustain your refusal to answer the last question. At least let me state that Judge Cooper's sentence indicates, filed March 20, that Mr. Bryan pleaded guilty to knowingly and wilfully and unlawfully assaulting persons and putting in jeopardy the lives of persons by the use of dangerous weapons and devices, et cetera." (A. 29)

At the request of the Government, the Court then conferred immunity on Bryan pursuant to 18 U.S.C. Section 6003 and the questioning continued:

"By Mr. Feinberg

Q. Mr. Bryan, do you know the defendant Robert Joel Anderson?

A. I refuse to answer the question on the ground that it might tend to incriminate me.

The Court: Mr. Bryan, I am directing you to answer that question because it can no longer tend to incriminate you since I have conferred upon you immunity from prosecution.

The Witness: Your Honor, the question in point, I did not ask for this immunity.

The Court: You did not ask what?

The Witness: I was not asked for this immunity.

The Court: I know, Mr. Bryan, but it isn't necessary for you to ask. The Government has the right to ask me to confer it on you whether you want it or not. I am telling you as the person responsible to tell you what the law is and even Mrs. Hermann will agree with me on this one that you have no right to refuse immunity.

Therefore, I am instructing you that you must answer the question or I will hold you in contempt of Court.

Do you continue to refuse to answer the question?

The Witness: Yes, your Honor.

The Court: All right.

Mr. Bryan, I shall proceed upon due reflection to impose a penalty upon you for your failure to obey the instructions of the Court. At the moment, I am merely ruling that you are in contempt of Court.

I will impose sentence shortly. I ask you to return to the witness room. I would like to confer with counsel where we go from here.

The Witness: Thank you, your Honor.

(Witness excused.)" (A. 31-32)

Shortly thereafter Bryan was brought back into the courtroom and after the Court heard briefly from Mrs.

Hermann, Bryan was sentenced to six months in prison consecutive to the sentence imposed pursuant to his guilty plea. The Court made clear, however, that it did not consider the sentence absolute, and that it would consider reducing the sentence after the Section 4208 study that Bryan was then undergoing was completed or after any appeal from the contempt conviction had been completed (A. 33-34).

SUMMARY OF ARGUMENT

The use of summary contempt power "always, and rightly, is regarded with disfavor" *Taylor v. Hayes*, ____ U.S. ____, 94 S. Ct. 2697, 2703 (1974). While this Court has consistently recognized that the courts are empowered to punish summarily disruptive behavior in the presence of the court, *Ex Parte Terry*, 128 U.S. 289 (1888), that power is limited to situations "where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In Re Oliver*, 333 U.S. 257, 275 (1948).

Respondent Bryan's orderly refusal to testify on the ground that the immunity conferred upon him was not co-extensive with his Fifth Amendment privilege was not the type of affront to the dignity of the court that required the imposition of summary punishment. Indeed, given the fact that Bryan's own lawyer was not present on the day in question and given Bryan's obvious confusion concerning the nature of the proceeding to confer immunity, there was every reason to postpone the proceedings to punish Bryan for

contempt for a brief time to allow Bryan's regular attorney to be present.

There is no merit to the Government's argument that *Harris v. United States*, 382 U.S. 162 (1965), should be overruled. Not only is the result in *Harris* supported by the prior decisions of this Court, but, as Justice Stewart noted in his dissent in *Harris*, the need for "consistent guidance to the federal judiciary" as to the application of the rules promulgated by the Court, is a factor which should be weighed heavily before any decision is made to overturn an existing construction of one of these rules. 382 U.S. at 168.

ARGUMENT

A TRIAL JUDGE MAY NOT SUMMARILY SENTENCE A PERSON WHO RESPECTFULLY REFUSES TO TESTIFY TO SIX MONTHS IN PRISON

As recently as last June, this Court again recognized that, while trial courts may have the power to punish certain contempts summarily, without notice or hearing, " '[s]ummary punishment always, and rightly, is regarded with disfavor' ", *Taylor v. Hayes*, ____ U.S. ____, 94 S.Ct. 2697, 2703 (1974) (Quoting *Sacher v. United States*, 343 U.S. 1, 8 (1952)). A review of the development of the law of contempt establishes that considerations of "due process" preclude the use of summary contempt power where, as here, the contempt involves an orderly refusal to testify and that Rule

42(a) was not intended to authorize summary punishment in such circumstances.

The power of the Court to punish certain contempts summarily was established by this Court's decision in *Ex Parte Terry*, 128 U.S. 289 (1888), in which the Court sustained the summary punishment of an individual who had been involved in an altercation with a marshal in the courtroom. Although the assertion of the Court in *Terry* that the power to punish summarily was well established at common law has been seriously questioned, its holding that there is such a power in certain cases has never been overruled. See *Bloom v. Illinois*, 391 U.S. 194, 198 n. 2 (1968); Fox, *The Summary Process to Punish Contempt*, 25 L.Q.Rev. 238 (1909); Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts - A Study in Separation of Powers*, 37 Harv.L.Rev. 1010, 1042-46 (1924). Decisions subsequent to *Terry* indicate, however, that the power to punish contempt summarily is and should be limited to disruptive behavior in open court.

In *Savin, Petitioner*, 131 U.S. 267 (1889), the petitioner was held in contempt for attempting to bribe a witness waiting in a room near the courtroom. The Court found defendant's actions met the statutory requirement that the act occur in the "presence of the Court," and stated:

> "We are of the opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court.

> It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts and punish the offender, without further proof, and without issue or trial in any form,' *Ex Parte* Terry, 128 U.S. 289, 309; whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286." 131 U.S. at 277

In *Cooke v. United States*, 267 U.S. 517 (1925), the Court analyzed the above language of *Savin* and the distinction between that case and *Terry* as follows:

> "This difference between the scope of the words of the statute 'in the presence of the court,' on the one hand, and the meaning of the narrower phrase 'under the eye or within the view of the court,' or 'in open court' or 'in the face of the court,' or 'in *Facie curiae*,' on the other, is thus clearly indicated and is further elaborated in the opinion.
>
> "We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the 'very hallowed place of justice,' as Blackstone has it, is not instantly suppressed and punished, demoralization of the court's authority will follow. *Punishment without*

issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; *but the need for immediate penal vindication of the dignity of the court created it*." 267 U.S. at 536 (Emphasis added.)

That the power to punish summarily was limited to court-disrupting misconduct was re-affirmed by this Court in *In Re Oliver*, 333 U.S. 257, 274 (1948), in which the Court reviewed the relationship of *Terry* and *Cooke* as follows:

"That the holding in the *Terry* case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in *Cooke v. United States* 267 U.S. 517, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Furthermore, the Court explained the *Terry* rule as reaching only such conduct as created 'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that, if 'not instantly suppressed and

punished, demoralization of the court's authority will follow.' *Id.* at 536.

"Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." 333 U.S. at 274-275.

The cases cited above refute the suggestion by the Government that summary contempt procedures are appropriate any time the alleged contempt occurs in open court (Gov. Br. p. 13), and give meaning to the language of Rule 42(a), which was not designed to change existing law but was "substantially a restatement of existing law. *Ex Parte Terry*, 128 U.S. 289. *Cooke v. United States*, 267 U.S. 517"; see Reviser's Notes, 18 U.S.C.A. Rule 42; *Offutt v. United States*, 348 U.S. 11, 13-14 (1954); *Brown v. United States*, 359 U.S. 41, 51 (1959); *Harris v. United States*, 382 U.S. 162, 165 n. 3 (1965).

Thus, even though the contempt at issue here occurred in the presence of the judge, respondent's

orderly refusal to testify did not involve such "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge", *Cooke v. United States, supra* at 536, as would justify resort to the summary procedure provided by Rule 42(a).

Here the trial judge specifically noted that in refusing to testify Bryan did not "have a chip on his shoulder toward the Court or towards me" (A. 33). Thus, there was nothing in the way Respondent Bryan conducted himself that required the immediate punishment to protect the dignity of the court.

Nor was there anything in the circumstances that required resort to summary proceeding and the immediate sentencing of Respondent. While the Government argues that immediate punishment might persuade a reluctant witness to testify, nothing that the Court said or did suggested that this was the reason for the Court's action. Indeed, since Bryan's sentence for contempt was not to begin until he finished a sentence he was then serving, and the Court indicated it would review the contempt sentence in the future, the sentence imposed had no immediate impact.* Moreover, even if it was felt that the imposition of a contempt sentence, as opposed to the citation for contempt, might have some effect on a reluctant witness, it would not have been unreasonably disruptive to delay the trial for at least 24 hours to give the witness an opportunity to confer with his counsel and prepare to respond to

*Similarly, in the case of the Respondent Wilson there was no immediate impact since he was then in custody in lieu of bail and the Court did not even increase his bail (A. 21).

the contempt charge. As Justice White said for this Court in *Taylor v. Hayes, supra* at 2704:

> "For the accused contemnor facing a jail sentence, his 'liberty is valuable and must be seen as within the protection of the [due process clause]. Its termination calls for some orderly process, however informal.' " (Quoting Morrissey v. Brewer, 408 U.S. 471, 482 (1972).)

Here Respondent Bryan was not afforded the minimal requirements of due process. He was ordered to testify and then punished for contempt at a time when his own lawyer could not be present. While the exigencies of the situation may have been such as to justify calling him as a witness and assigning another lawyer to represent him, there was no compelling necessity for proceeding to punish Bryan for contempt in the absence of his regular lawyer. The reason for having a contempt hearing is to permit the contemnor to offer facts "relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." *Cooke v. United States*, 267 U.S. at 537; *Harris v. United States*, 382 U.S. 162, 166-167.

Given Bryan's obvious confusion as to the scope of his guilty plea and the significance of the fact that he had not requested immunity, which is reflected in the portions of the transcript quoted above, it was particularly important to give him the opportunity to consult with his regular attorney, Mr. Brown, before sentencing him to six months in jail for contempt. Mr. Brown might have been able to persuade Bryan to testify or, at least, to offer information in extenuation not known to Mrs. Hermann. Since Brown was apparently the one who had discussed the immunity

question with Bryan originally (A. 21), he might have been able to give the court a much better insight into the extent to which Bryan's refusal was based on a legitimate concern that what he testified to would be used against him at the time he was resentenced, or, perhaps, a fear of reprisal against him in prison if he testified for the Government. Certainly, a contemnor should be given the opportunity to produce such evidence before the maximum sentence is imposed on him for contempt.

It is hard to believe that the orderly functioning of the district courts would be severely hampered by a ruling by this Court that a witness, who, in a courteous manner, refuses to testify, is entitled to the procedural safeguards provided for in Rule 42(b) before he is sentenced to six months in prison. Indeed, a parade of horrors argument similar to that put forth by the Government here was rejected by this Court in *Bloom v. Illinois, supra* at 208, where the Court stated:

> "We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice . . .
>
> "We place little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily . . . "

Finally, note should be taken of the Government's argument that *Harris v. United States, supra*, should be overruled, and the Court should follow its earlier decision in *Brown v. United States*, 359 U.S. 41. First,

it is important to note that while *Brown* affirmed the use of summary contempt for a refusal to testify, that issue apparently was not even raised by the petitioner in *Brown*. See 359 U.S. at 48. ("petitioner does not question the power of the court to punish disobedience of its lawful order as criminal contempt, and to do so summarily, if the disobedience occurs in the presence of the Court and in the sight or hearing of the judge.") (footnotes omitted) In addition, as Justice Stewart stated for the dissenters in *Harris*:

> "The particular question at issue here is of limited importance. But in this area the Court's duty is important, involving as it does the responsibility for clear and consistent guidance to the federal judiciary in the application of ground rules of our own making. We are not faithful to that duty, I think, when we overturn a settled construction of those rules for no better reasons than those the Court has offered in this case." 382 U.S. at 168.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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